

Sex on digital identity – an equality impact assessment

Introduction

The UK Government has laid out proposals for a national digital identity (UK digital ID or “BritCard”).¹ The rationale behind the proposal is stated to be “to make people’s everyday lives easier by modernising old-fashioned processes” and to:

- be a convenient way for people to prove who they are
- be secure and put people more in control of their data
- offer everyone eligible access to an inclusive ID, without up-front charges
- help government to reduce bureaucracy and build the intuitive, efficient, and responsive public services the UK deserves.

It will work together with a broader ecosystem of digital verification services provided by the private sector under the UK digital verification services trust framework.

The government’s proposal is that it will not include sex. Sex Matters proposes that it should include sex (accurate biological sex) as an optional field.²

Sex Matters has created this equality impact assessment (EIA) to consider the equality impact of:

- a) **the Sex Matters proposal** – sex on digital ID as an optional field
- b) **the government’s proposal** – no sex on digital ID
- c) **a third alternative:** including “passport sex” – this is not accurate or reliable, since people can change the sex recorded on their passport on request.

We consider all nine of the protected characteristics but are specifically focused on the seven which are most relevant namely age, disability, gender reassignment, race, religion/belief, sex and sexual orientation. For each protected characteristic affected we consider positive and negative impacts and potential mitigations for any negative impact.

This EIA also considers the position in respect of human rights and recognition of sex and “gender identity” and administrative coherence.

¹ HM Government (2026) *Making public services work for you with your digital identity*.

² Sex Matters (2026). *Putting sex on digital ID – a briefing*.

Summary

The public-sector equality duty (PSED) requires public bodies to have regard the need to:

- **eliminate unlawful discrimination, harassment, victimisation**
- **advance equality of opportunity** between people with different protected characteristic
- **foster good relations** between people with different protected characteristics

The Supreme Court in *For Women Scotland v Scottish Ministers [UKSC 2025]* emphasised that the PSED is an obligation to consider the distinct discrimination and disadvantage faced by groups that share protected characteristics, and that women have experienced and continue to experience discrimination or disadvantage related to their sex. Addressing the particular needs, disadvantages or participation levels of women is undermined if women and men as groups cannot be identified, simply defined or spoken about.

The government proposal would not meet the requirements of Section 149 and would undermine the objectives of the PSED by making it materially more difficult for public-sector and private-sector organisations and individuals to meet the specific needs of women. The government proposal and the alternative (“passport sex”) proposal would increase the risk of indirect discrimination and harassment on grounds of sex and religion

The Sex Matters proposal would eliminate or materially reduce the risk of indirect discrimination and harassment on grounds of sex and religion or belief. It does not result in unlawful direct or indirect discrimination related to gender reassignment, or to a breach of transgender people’s right to private life under Article 8.

The Sex Matters proposal meets the objective of advancing equality of opportunity as it facilitates the understanding of the needs of women and men and the establishment and operation of single-sex and separate-sex services and so enables the needs of women and men, gay men and lesbians and some religious groups to be better met.

By enabling clarity about whether individuals are male or female and which spaces and services they can use or provide, it facilitates a comprehensible environment, which is particularly important for the security and inclusion of young children, older people and people with mental or sensory disabilities, as well as for transgender people, who will better understand expectations.

The Sex Matters proposal supports good relations by providing greater clarity about the separate groups and protected characteristics, which allows discussion about how needs can be met without descending into familiar polarised arguments such that it is offensive to refer to a person’s sex, or that “genital inspections” or chromosome tests are required before anyone can be excluded from a single-sex service.

Sex is a protected characteristic and it must be able to be spoken about clearly and without fear in order to foster good relations. A state that does not enable its citizens to reliably verify this important fact about themselves as part of their ID is arguably breaching their rights under Article 8 of the European Convention on Human Rights (ECHR).

1. Sex is included on digital ID

1.1. Proposal

- 1.1.1. An optional sex field is included on the government's digital ID. Data for the field is drawn primarily from the birth register, which is already being digitised and made accessible via the Life Event Verification (LEV) service for government departments with a data sharing agreement.³ Birth records delivered through this system remain accurate for everyone (note that this is not the same as a paper birth certificate, which can be issued based on a record in the gender-recognition register).
- 1.1.2. Sex is marked as an immutable data field. It can only be changed if there is a data error (in the same way that a date of birth is immutable on digital ID).
- 1.1.3. For those not born in the UK, this route for administrative verification of their sex (as recorded at birth) is not possible, and other alternative sources of verification would need to be identified, which could include:
 - UK marriage records if married before 2004
 - a UK birth record for a mother having given birth in the UK⁴
 - an overseas birth certificate if from a country which does not allow a change of birth certificate
 - a vouch from a relevant professional such as a GP with legal penalty for knowingly false declaration
 - a sworn declaration combined with legal penalty for a knowingly false declaration
 - a record of a cheek swab such as that undertaken as part of an athletic registration process.
- 1.1.4. Individuals could choose whether to include sex on their digital ID, and whether to share that data with service providers, clubs and associations, public bodies and so on or to keep it private (for example when used for proving age in a pub, the digital ID will not need to show a person's sex).

1.2. Positive impact

- 1.2.1. Currently, without such a system, individuals have no means to reliably share information about their sex or to consent to how it is shared. A person may share their accurate sex, but it is often recorded by organisations in a field that contains sex and/or gender identity. The data can therefore not be retrieved and used according to data-protection principles.

³ HM Passport Office (2020). 'About LEV'.

⁴ A record of fatherhood should indicate that the person is a man (and not a woman who identifies as a transgender man). This was recently clarified by the case of *FZ v MZ [2025] EWHC 3338 (Fam)*. However, we understand that there may have been cases in practice of trans-identifying females with GRCs being registered as fathers.

- 1.2.2. This makes it practically difficult for service providers. While sex is often obvious face to face regardless of how someone identifies, there is scope for mistakes to be made; there is in any event no robust system for verification based on administrative data. Staff are placed in a difficult position if someone claims to be the opposite sex as they may feel this is difficult to challenge. If they do have doubts and make a challenge, they are unable to rely on anything beyond their own perception and that of others present, since passports and driving licences can be easily changed and may indicate the person's "sex" as being the opposite to their actual sex. Organisations and their employers are at risk of committing indirect discrimination or harassment, or both, if they wrongly admit an individual to a single sex service provided for the opposite sex. The Sex Matters proposal provides a solution to these issues as set out below.
- 1.2.3. The Sex Matters proposal provides people who want it with a means to share the data on their sex accurately and with their consent.
- 1.2.4. Including accurate sex on digital ID provides service providers, public bodies, employers, clubs and associations and so on with a simple, discreet and trusted means to verify an individual's sex where relevant.
- 1.2.5. Including accurate sex on digital ID enables men and women to access single-sex and separate-sex services, join single-sex groups and clubs and so on in the confidence that they are robustly single-sex because sex is easily verified. It also enables gay men and lesbians seeking services, clubs, associations and suchlike aimed at their sex to have confidence in the service (for example a gay men's dating app).
- 1.2.6. Including accurate sex on digital ID provides a trusted authoritative source of information about this personal characteristic which can be used by private-sector digital verification services, with confidence (knowing when a person has consented for their sex to be recorded or shared).
- 1.2.7. Those who identify as trans can choose to share details of their sex where relevant, and where relevant can do so discreetly with one simple ID.
- 1.2.8. Training staff and volunteers is made simple, as the process of checking is discreet, reduces the risk of confrontational or intrusive questions and minimises the risk of mistakes.
- 1.2.9. Organisations and their staff are not exposed to the risk of committing discrimination and harassment that would otherwise potentially occur by inadvertently allowing members of the opposite sex to access services, clubs and so on.
- 1.2.10. Single-sex services are therefore offered with reduced costs and greater confidence for providers.
- 1.2.11. Individuals who do not wish to share information on their sex in any particular situation will be able to maintain that information as private – they will understand

which services require sex to be declared (such as a separate-sex changing room) and which do not (such as hiring a car).

1.3. Analysis of impact on each protected characteristic

Sex

- 1.3.1. Everyone is able to share reliable information on their sex whenever they wish to, and to keep that information private when they do not. This may be important both when sex has legal relevance and when it has social relevance. A state that does not enable its citizens to reliably verify this important fact about themselves as part of their ID is arguably breaching their rights under Article 8 ECHR.
- 1.3.2. Trusted verification of sex will provide confidence for users of single-sex and separate-sex services.
- 1.3.3. The existence of national digital ID containing accurate sex will clarify the concept, and make it easier for people to expect an honest answer to a straightforward question, even in situations where ID is not used.
- 1.3.4. Materially reduces or eliminates the risk of women experiencing harassment (through violation of dignity or hostile environment) that would occur if men were admitted to female-only services (and vice versa).
- 1.3.5. Since women are more likely to be placed at a particular disadvantage where single-sex services are not provided or ostensibly single-sex services aimed at women admit men, the proposal would eliminate or materially reduce the risk of indirect discrimination⁵.
- 1.3.6. The risk of sexual assault is reduced in services where women are in a vulnerable position if men are admitted (for example single-sex wards in hospitals, prisons).
- 1.3.7. Ease of verification is likely to increase the availability of single-sex and separate-sex facilities, clubs and services, particularly in the voluntary sector and so better meet women's needs.
- 1.3.8. No negative impacts identified.

Gender reassignment

- 1.3.9. Individuals who wish to have their sex kept private in some situations (where the data is not needed) are able to do so by means of an identity document which only reveals their sex where they wish to share it. Thus their rights under Article 8 (to a degree of privacy about their personal information) are respected.

⁵ For example in any services or facilities that involve being undressed or half-dressed, both men and women do not wish to be exposed to members of the opposite sex while undressing, but this is particularly important for women. While 49% of men in the general population say they feel uncomfortable being naked in a same sex communal changing room, the figure among women is 67% (see YouGov (2023). ['What makes men uncomfortable?'](#))

- 1.3.10. Those identifying as trans (or non-binary),⁶ like everyone else will have a trusted and discreet means of verification of sex with their consent, for example where it is relevant to qualify for a sporting competition or to to access single-sex and separate-sex services, regardless of their appearance.
- 1.3.11. Those identifying as trans (or non-binary) who opt to have sex verification included in their ID, like everyone else will have the choice not to share data on their sex where it is not relevant or needed. It will be clear to them what information they are consenting to share.
- 1.3.12. The ability of service providers to verify sex is likely to make it more difficult for trans-identifying men to gain access to female-only services (and for trans-identifying women to access male-only services). However, such access is not lawful, so this cannot be regarded as a negative impact.
- 1.3.13. The option to include sex as a data field on digital identity does not undermine the rights of individuals who identify as transgender to express their gender identity in their private life. For example they may refer to themselves as a “trans woman”, “trans man”, “non binary”, “gender queer” or any other personal designation such as Mr, Ms Mrs or Mx and ask people to refer to them as he/she/they/zee/per or any other words that they wish.
- 1.3.14. Trans-identifying individuals will not be “outed” or locked out of services by “Know Your Customer” (KYC) failures or red-flagging as synthetic identities. They, like everyone else, will have their sex recorded accurately in the sex field if they wish it to be, or not at all where they prefer and the data is not needed.
- 1.3.15. The digital ID system will not include a record of whether people identify as transgender, protecting the privacy of those who do.
- 1.3.16. For an individual who has a gender-recognition certificate the digital identity would not include their “acquired gender” (as recorded in the gender-recognition register) but their biological sex (as recorded in the birth register). Therefore it could not be used for any legal purposes that require verification of “acquired gender” under the Gender Recognition Act. One example would be for registering a marriage. But this is not an everyday occurrence, and since the registration is done with the registrar it should not be difficult to verify a person’s entry on the gender-recognition register individually, with their consent. There is no breach of privacy in this situation since the other party to the marriage has a right to know the actual sex of their partner.

Age

- 1.3.17. A simple-to-understand and reliable system of verifying sex enables care homes and providers of personal care services to the elderly, older people and their families to confirm the sex of potential carers where same-sex care is required. This is important for all involved in engaging carers, and all the more so for individual elderly people and their relatives to avoid confusion.

⁶ There is no definitive case law as to whether those who identify as non-binary can have the protected characteristic of gender reassignment, but for the purposes of this EIA, we have assumed that they may.

- 1.3.18. The elderly make up a significant proportion of hospital patients. The proposal provides a quick and simple way for hospitals and similar settings to ensure that single-sex wards are single-sex without intrusive questioning.

Sexual orientation

- 1.3.19. Trusted verification of sex will provide confidence for gay men seeking access to services aimed at gay men and lesbians seeking access to services aimed at lesbians, including for example online dating services.
- 1.3.20. It materially reduces or eliminates the risk of women experiencing harassment (through violation of dignity) that would occur if men were admitted to lesbian-only services (or women admitted to services for gay men).
- 1.3.21. Since women are more likely to be placed at a particular disadvantage where services aimed at lesbians are not provided or where services aimed at lesbians admit men, the proposal would eliminate or materially reduce the risk of indirect discrimination against lesbians in this context.
- 1.3.22. Ease of verification is likely to increase the availability of facilities, clubs and services specific to lesbians or gay men, particularly in the voluntary sector.
- 1.3.23. No negative impacts identified.

Disability

- 1.3.24. A simple-to-understand and reliable system of verifying sex enables care homes and providers of services to disabled people and their families to confirm the sex of potential carers where same-sex care is required. This is important for all involved in engaging carers, and all the more so for individual disabled people and their relatives to avoid confusion..
- 1.3.25. Being clear about what sex people are, such as in single-sex services or situations of consent to personal contact, can also be important for the inclusion of people with disabilities in everyday life. For people with mental or sensory disabilities it may be harder to read cues or to understand what is meant by complex and confusing statements which conflate sex and identity. Having a national system of digital ID which makes clear the definition of sex and enables people to prove their sex supports clarity about which spaces different groups of people can use and who they will share them with. This creates a more comprehensible landscape, which is particularly important for disabled people.

Race

- 1.3.26. Inability to rely on the birth register and the need for an alternative step may impact those born abroad who are less likely to be of a nationality other than British and more likely to be of an ethnicity other than white. Approximately 16% of the UK population were born abroad and could in principle be affected.

- 1.3.27. This impact would be mitigated by making alternative sources of verification available at no additional cost.
- 1.3.28. One solution to enable people not born in the UK to prove their sex administratively is to allow them to draw on records of birth of children. A significant proportion of women born abroad have children who were born in the UK, and as such will have easy access to verification via the birth register relating to their children or their GP (31.8% of births in England and Wales are to non-UK-born women). In the case of men, access to verification may be available via the UK birth register relating to their children; however, it is not clear to what extent registration of only males as fathers has been maintained as robust practice. But in any case verification of female sex is a more practical use-case (for example in relation to sport, the female category is protected whereas the male category may simply be “open”).
- 1.3.29. In the case of those without children, the Home Office may have access to reliable identity data obtained in respect of immigration status.
- 1.3.30. Other readily available sources of verification would be available including GP and individual statutory declaration (a “vouch”) (combined with a legal penalty for knowingly making a false declaration).
- 1.3.31. Any additional steps required would in any event be objectively justified by the legitimate aim of providing a simple means to verify access to single-sex facilities and services, to the benefit of the majority of the population.
- 1.3.32. That those from other countries may be unable to easily prove their sex administratively because of their home country’s legislative choices (for example, sex on a birth certificate or passport from Germany does not reliably show biological sex) would be no worse off than they would be if the UK did not provide a means for UK-born citizens to readily prove their sex.

Religion or belief

- 1.3.33. Some Muslim people and orthodox Jewish people are unable to access certain types of mixed-sex services, in particular where this involves being in a state of undress, partially dressed or bodily contact (such as a judo class). A trusted verification system will ensure that they can have confidence in single-sex and separate-sex services.
- 1.3.34. Schedule 4 Paragraph 3 of the Gender Recognition Act provides that “A clergyman is not obliged to solemnise the marriage of a person if the clergyman reasonably believes that the person’s gender has become the acquired gender under the Gender Recognition Act 2004” and similarly for a clerk in Holy Orders of the Church in Wales. The ability to accurately check a person’s sex would support clergy wishing to be sure that they are operating within their own religious ethics, and avoid having to guess or challenge.
- 1.3.35. People who hold “gender critical” beliefs (which may be of a religious or secular and philosophical nature) hold their sex to be an important fact about them. It can be

particularly important to them to be able to prove their own sex through administrative documents and records and to be assured that when they give consent for their sex to be shared they are not giving consent for it to be interpreted as a “gender identity”.

2. Sex is not included as a data field on national digital ID

2.1. Proposal

- 2.1.1. Government digital ID would not include a sex field.
- 2.1.2. There is some guidance to public authorities and private-sector digital verification service providers in relation to the personal attribute of sex, but there is no simple way for private-sector service providers to access an authoritative source of accurate sex data.

2.2. Positive impact

- 2.2.1. Individuals who wish to have their sex kept private in some situations are able to do so by means of an identity document which does not show their sex.
- 2.2.2. The national digital ID does not include unreliable information (such as “passport sex”).

2.3. Analysis of impact on each protected characteristic

Sex

- 2.3.1. Individuals have no means to reliably verify their biological sex from official documents and sources.
- 2.3.2. Different digital verification service providers may have different concepts, definitions and sources for the sex field, leading to confusion, conflict and unreliable data.
- 2.3.3. Negative impact for men and women since service providers, public bodies, clubs and associations etc have no fully trusted means to verify sex, leading to a lack of confidence for users of single-sex and separate-sex services.
- 2.3.4. Increased risk of women experiencing harassment (through violation of dignity) that would occur if men were admitted to female-only services (and vice versa).
- 2.3.5. Increased risk of sexual assault in services where women are in a vulnerable position if men are admitted (such as single-sex wards in hospitals, prisons).
- 2.3.6. Since women are more likely to be placed at a particular disadvantage where single-sex services are not provided or ostensibly single-sex services aimed at

women admit men, the proposal would materially increase the risk of indirect discrimination.

- 2.3.7. Lack of easy means of verification may impact the availability of single-sex and separate-sex facilities, clubs and services, as providers, organisations and their staff are concerned about the difficulties of confirming entitlement to use services, staff training will be more difficult, and staff, particularly those working in the services sector, who are often not well paid and junior, are reluctant to challenge individuals claiming to be the opposite sex. This is difficult for all sectors but may be particularly acute in the voluntary sector and for clubs and associations reliant on volunteers.
- 2.3.8. Digital verification service providers have no single authoritative source of sex data. This will make it difficult for them to include sex as an attribute in their systems, even though it is possible in theory. They may include more readily available but unreliable sources (such as “passport sex”), increasing confusion and conflict and undermining ability to recognise and record sex accurately.

Gender reassignment

- 2.3.9. Individuals who wish to keep their sex private can do so.
- 2.3.10. Negative impact for those who identify as trans (and non-binary) as they will not have a fully trusted means to verify their sex where they need to share this information.
- 2.3.11. Negative impact for those who identify as trans (and non-binary) as they may face more intrusive and insensitive questioning and invasions of privacy when they wish to access single-sex services corresponding to their birth sex.
- 2.3.12. Negative impact as the absence of a definitive record and misalignment between different records may be more likely to trigger “Know Your Customer” failures.

Sexual orientation

- 2.3.13. Negative impact for lesbians and gay men since service providers, public bodies, clubs and associations aimed at either gay men or lesbians have no fully trusted means to verify sex, leading to lack of confidence for users of services aimed only at gay men or at lesbians (such as online dating services).
- 2.3.14. Increased risk of lesbians experiencing harassment (through violation of dignity) that would occur if men were admitted to lesbian-only services (and vice versa).
- 2.3.15. Since lesbian women are more likely to be placed at a particular disadvantage where lesbian-only services are not provided or ostensibly lesbian-only services admit men, the proposal would materially increase the risk of indirect discrimination.
- 2.3.16. Lack of easy means of verification may limit the availability of lesbian-only or gay-male-only facilities, clubs and services.

Race

- 2.3.17. Those of non-white ethnicity or a nationality other than British may be more likely to be of a religion which requires properly verified single-sex services (see 2.3.18). A proposal which verifies sex based on unreliable data would mean this need was not met.
- 2.3.18. People who do not speak English, or have English as a second language, will find it harder to understand whether a service is single-sex, or what sex a carer, or person in a cared-for situation is without clear, accurate data.

Religion or belief

- 2.3.19. Negative impact for those religious groups (such as some Muslim people and some orthodox Jewish people) who are unable to access certain types of mixed-sex services, in particular where this involves being in a state of undress, partially dressed or bodily contact (such as a judo class).
- 2.3.20. Negative impact on those who hold “gender critical” beliefs (whether religious or secular and philosophical) who are unable to rely on a government document or data source to verify their own sex and to ensure data protection so that it is not mixed with or interpreted as “gender identity” data.

3. “Sex” is included with verification based on passport data

3.1. Proposal

- 3.1.1. National digital ID to include a “sex” (and/or “gender”) field.
- 3.1.2. Data for the field drawn from sources including the sex marker on a passport (which is based on a mixture of sex for most people, and gender self-identification for individuals who have asked for their sex marker to be changed) – so sex would be marked as a mutable characteristic.

3.2. Positive impact

- 3.2.1. Individuals who wish to be recorded as the opposite sex on official documentation (predominantly those with the protected characteristic of gender reassignment) will have that wish fulfilled (note that this wish is not a human right).

3.3. Analysis of impact on each protected characteristic

Sex

- 3.3.1. Other people are misled about a person's sex, since many people do not know that "sex" is a mutable data field on passports with no legal meaning or wider applicability.
- 3.3.2. Individuals have no means to reliably verify their biological sex from official documents and sources.
- 3.3.3. Negative impact for men and women since service providers, public bodies, clubs and associations etc would have no fully trusted means to verify sex.
- 3.3.4. Lack of confidence for users of single-sex and separate-sex services.
- 3.3.5. Increased risk of women experiencing harassment (through violation of dignity) that would occur if men were admitted to female-only services (and vice versa).
- 3.3.6. Increased risk of sexual assault in services where women are in a vulnerable position if men are admitted (such as single-sex wards in hospitals, prisons).
- 3.3.7. Since women are more likely to be placed at a particular disadvantage where single-sex services are not provided or ostensibly single-sex services aimed at women admit men, the proposal would materially increase the risk of indirect discrimination.
- 3.3.8. Lack of easy means of verification is likely to reduce the availability of single-sex and separate-sex facilities, clubs and services, as providers and organisations and their staff or volunteers will be concerned about the difficulties of confirming entitlement to use services, staff training will be more difficult, and staff, particularly those working in the services sector, who are often not well paid and junior, will be reluctant to challenge individuals claiming to be the opposite sex and will have nothing to back up their concerns if the ID has been verified by reference to inaccurate data.
- 3.3.9. While "passport sex" is known to be unreliable and may be treated as such by well-informed service providers (for example, women's refuges turning away a trans-identifying male individual even with a "female" passport), by translating the sex marker drawn from a passport into an interoperable free-floating personal data attribute this approach would do significantly more harm to the ability to maintain accurate records of sex in any administrative system.
- 3.3.10. The "sex" field on digital identity could be marked as unreliable (both on the face of the ID and in metadata). However, doing this would raise the question of why unreliable data is being used.

Gender reassignment

- 3.3.11. Positive impact for individuals who wish to be recorded as the opposite sex on official documentation and those who wish to have their sex kept private in some situations.
- 3.3.12. Individuals with their gender identity recorded in place of their sex on digital ID are likely to try to use this to access services provided for members of the opposite sex. They may view this as a positive impact for them, but it cannot be viewed as a positive impact as it is not in line with the Equality Act, or their entitlements.
- 3.3.13. Negative impact for those who identify as trans (and non-binary) as they will not have a fully trusted means to verify their sex in situations where they need to access single-sex services corresponding to their birth sex.
- 3.3.14. Negative impact for those who identify as trans (and non-binary) as they may face more intrusive and insensitive questioning and invasions of privacy when they wish to access single-sex services corresponding to their birth sex.
- 3.3.15. Negative impact for those who have a sex record which is different from their biological sex as it will not be clear when they are being asked to share data on their actual sex or gender identity. They will not be able to give clear consent and control their own data. They are more likely to be “outed” as trans or locked out of services because of “Know Your Customer” failures or red-flagging as synthetic identities.

Sexual orientation

- 3.3.16. Negative impact for lesbians and gay men since service providers, public bodies, clubs and associations aimed at either gay men or lesbians have no fully trusted means to verify sex.
- 3.3.17. Lack of confidence for users of services aimed only at gay men or at lesbians (such as online dating services).
- 3.3.18. Increases the risk of lesbians experiencing harassment (through violation of dignity) that would occur if men were admitted to lesbian-only services (and vice versa).
- 3.3.19. Since lesbian women are more likely to be placed at a particular disadvantage where lesbian-only services are not provided or ostensibly lesbian-only services admit men, the proposal would materially increase the risk of indirect discrimination.
- 3.3.20. Lack of easy means of verification is likely to reduce the availability of lesbian-only or gay-male-only facilities, clubs and services, particularly in the voluntary sector.

Race

- 3.3.21. Those of non-white ethnicity or a nationality other than British may be more likely to be of a religion which requires properly verified single-sex services (see 3.3.21), A proposal which verifies sex based on unreliable data would mean this need was not met.

- 3.3.22. People who do not speak English, or have English as a second language, will find it harder to understand whether a service is single-sex, or what sex a carer or person in a cared-for situation is without clear, accurate data, and where digital ID provides unreliable data.

Religion or belief

- 3.3.23. Negative impact for those religious groups (such as some Muslim people and some orthodox Jewish people) who are unable to access certain types of mixed-sex services, in particular where this involves being in a state of undress, partially dressed or bodily contact (such as a judo class)

4. Public-sector equality duty

4.1. Conclusions

- 4.1.1. The PSED requires public bodies to have regard the need to:
- eliminate unlawful discrimination, harassment, victimisation and any other unlawful conduct prohibited by the Equality Act 2010
 - advance equality of opportunity between people who share and people who do not share a relevant protected characteristic
 - foster good relations between people who share and people who do not share a relevant protected characteristic.
- 4.1.2. The Supreme Court in *For Women Scotland v Scottish Ministers [UKSC 2025]* stated that “all organisations subject to the PSED must have due regard, in considering their rules, policies or practices, to the matters set out in section 149, undertaking where appropriate an equality impact assessment in order to understand how and to what extent the policy in question will affect specific groups with different protected characteristics”. The Supreme Court emphasised that the PSED is an obligation to consider the distinct discrimination and disadvantage faced by groups that share protected characteristics, and that women are a group that have experienced and continue to experience discrimination or disadvantage related to their sex flowing from shared biology, societal norms or prejudice related to women. The Supreme Court clearly recognised that the purpose of addressing the particular needs, disadvantages or participation levels of women as a group with the protected characteristic of sex is undermined if women as a group cannot be identified, simply defined or spoken about.
- 4.1.3. It is therefore clear that the government proposal would not meet the requirements of Section 149 and would indeed undermine the objectives of the PSED by making it materially more difficult for public-sector and private-sector organisations and individuals to meet the specific needs of women.

4.2. Objective 1: The need to eliminate unlawful discrimination, harassment, victimisation and any other unlawful conduct prohibited by the Equality Act 2010

- 4.2.1. The Sex Matters proposal would eliminate or materially reduce the risk of indirect discrimination and harassment on grounds of sex and religion or belief for the reasons identified here in paragraphs 2.3.2 to 2.3.7.
- 4.2.2. The government proposal and the alternative proposal would increase the risk of indirect discrimination and harassment on grounds of sex and religion for the reasons identified here in paragraphs 3.3.1 to 3.3.8 and 4.3.1 to 4.3.10.
- 4.2.3. The Sex Matters proposal does not result in unlawful direct or indirect discrimination related to gender reassignment.

4.3. Objective 2: The need to advance equality of opportunity between people who share and people who do not share a relevant protected characteristic.

- 4.3.1. Section 149 of the Equality Act states that having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
 - remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
 - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
 - encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- 4.3.2. The Sex Matters proposal meets this objective as it facilitates the understanding of the needs of women and men and the establishment and operation of single-sex and separate-sex services and so enables the needs of women and men, gay men and lesbians and some religious groups to be better met. For example, it would facilitate a self-defence class aimed at women which some women would feel unable to attend if it was mixed-sex due to the risk of physical contact with men.
- 4.3.3. By enabling clarity about whether individuals are male or female and which spaces and services they can use or provide, it facilitates a comprehensible environment which is particularly important for the security and inclusion of young children, older people and people with mental or sensory disabilities, who are more likely to be confused and who may be less able to read physical or social cues, or resist pressure not to challenge a man in a woman's space or undermining consent.

4.3.4. The government proposal and the alternative proposal do not meet this objective as they do not facilitate the operation of such services.

4.4. Objective 3: Foster good relations between people who share and people who do not share a relevant protected characteristic.

4.4.1. The Sex Matters proposal meets this objective, by providing people and women in particular with greater confidence in using single-sex facilities and services as a result of sex verification undertaken in a discreet and non-confrontational way.

4.4.2. It also provides greater clarity about the separate groups and protected characteristics, which allows discussion about how needs can be met without descending into familiar polarised arguments such that it is offensive to refer to a person's sex, or that "genital inspections" or chromosome tests are required before anyone can be excluded from a single-sex service. Sex is a protected characteristic and must be able to be spoken about without fear in order to foster good relations.

4.4.3. If the government proposal or the alternative proposal were to be adopted, this objective would not be met and might be undermined as women in particular might consider with good reasons that their rights and access to single-sex facilities and services are undermined if trans-identifying males can also use them with impunity.

5. Human rights and administrative coherence

5.1. Legal framework

5.1.1. Article 8 of the European Convention on Human Rights provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

5.1.2. It is recognised that a person's identification as transgender or non-gendered is an aspect of private life within the meaning of article 8. But so too is their sex. Being transgender does not change a person's sex.

5.1.3. Both sex and "gender identity" are matters of personal information. Sex is also a matter of biological reality and legal recognition. A single data field which records "M" or "F" can either record everyone's sex accurately, or be used to allow some people to record the sex they wish they were (which may also be the sex recorded in the gender-recognition register). This is mixed data. If the second option is taken then the data field cannot serve the first purpose. It cannot do both.

5.2. Case law

- 5.2.1. A number of cases have considered the question of whether Article 8 imposes a positive obligation upon the state to allow a person to alter what is recorded in the “sex” field of a specific document such as a birth certificate or passport to reflect their gender identity in order to secure their right to respect for private life, and conversely whether a state’s unwillingness to do so constitutes an unjustified interference with the a person’s right to such respect.⁷ These cases concerned analogue records where a person’s sex would be shown, regardless of whether the data was needed.
- 5.2.2. The practice of allowing people to change their sex marker on some documents (such as UK passports) have been made simply through ad hoc custom and practice without legislative consideration, legal challenge or Parliamentary oversight. There has therefore not been consideration of other people’s rights, or wider impacts on administrative coherence.
- 5.2.3. In *Hämäläinen*, the Grand Chamber gave guidance at paras 65–67 as to the general principles applicable to assessing a state’s positive obligations. First, it explained that the principles applicable to assessing a state’s positive and negative obligations are similar. In both contexts, it said, “regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of article 8 being of a certain relevance”.
- 5.2.4. Next, it considered the concept of “respect”. Relevant factors concerned “the importance of the interest at stake and whether ‘fundamental values’ or ‘essential aspects’ of private life are in issue or the impact on an applicant of a discordance between the social reality and the law”. It emphasised that securing “the coherence of the administrative and legal practices within the domestic system” is a legitimate aim.
- 5.2.5. Finally, the court considered the state’s margin of appreciation. It accepted that in implementing their positive obligations under Article 8 the states enjoy a certain margin of appreciation. A number of factors had to be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual’s existence or identity was at stake, the margin allowed to the state would be restricted. Where, however, there was no consensus within the member states of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raised sensitive moral or ethical issues, the margin would be wider. There would also usually be a wide margin if the state was required to strike a balance between competing private and public interests or convention rights.
- 5.2.6. In the case of *Elan-Cane v Secretary of State for the Home Department* [2021] UKSC 56, the UK Supreme Court considered whether the European Convention on Human

⁷ See *Hämäläinen v Finland* [2014] 37 BHRC 55; *AP, Garçon and Nicot v France* [2017] ECHR 338 and *Elan-Cane (Appellant) v Secretary of State for the Home Department (Respondent)* [2021] UKSC 56.

Rights imposes an obligation to respect the private lives of individuals who identify as non-gendered by including a non-gendered “x” marker on passports. It concluded that it did not.

- 5.2.7. The key countervailing consideration was the community interest in administrative coherence. The Secretary of State argued that to recognise a non-gendered category of individuals in the context of passports would undermine the coherence of law and practice in the UK, and that the state was entitled to consider passports as part of broader legal and administrative systems.
- 5.2.8. As part of the case the Secretary of State relied on a 2014 review completed by HMPO on gender marking in passports. It emphasised that UK legislation “recognises only the genders Male and Female”. It noted that the record of a person’s “gender” in their passport is used for a variety of purposes including initial identification of the applicant by matching “with their birth, adoption certificate or a gender recognition certificate”, in person recognition by checking their physical appearance against their sex, and to enable officials to “deal appropriately with members of the public in passport-related matters, for example by addressing them in appropriate terms, and by arranging for physical checks at borders to be carried out by officers of the appropriate gender, without their having to ask embarrassing questions about the passport-holder’s gender”.
- 5.2.9. Several of these use cases are now outdated, because of social changes (it is widely recognised that someone who is male may choose to wear female clothing and be called by a women’s name and so on), technology (biometric checks mean that superficial aspects of “gendered” physical appearance are less important) and clarity about the law (when it comes to searching, sex matters).
- 5.2.10. Following *For Women Scotland* it would be more accurate to say that UK legislation recognises only the male and female sexes, with some people changing their sex for some legal purposes via the Gender Recognition Act 2004. The Supreme Court in *For Women Scotland* emphasised the importance of clarity and consistency in the definition of sex “both for those with legal rights and protections, and those who have duties imposed on them”.
- 5.2.11. It noted at paragraphs 151–153 that the Equality Act seeks to strike a balance between the rights of one group and another:

“It does so by regulating the practical day-to-day conduct of public and private sector employers (small, medium and large), service-providers and others in relation to employees, workers, service users and members of the public who have one or more protected characteristics. Since sex as a protected characteristic is a ground for these legal rights, it must be possible for sex to be interpreted in a way that is predictable, workable and capable of being consistently understood and applied in practice by this wide range of duty-bearers.”

- 5.2.12. It goes on to say:

“As we have said, the duties imposed by the EA 2010 require an ability to anticipate that particular rules, policies or practices might affect those who share a protected characteristic and have distinct needs or interests in consequence. Those upon whom the EA 2010 imposes duties (the duty-bearers) must regulate their conduct and practices to avoid unlawful indirect discrimination. Organisations considering taking appropriate positive action measures must be able to identify membership of a disadvantaged group sharing a particular characteristic. Public authorities subject to the duty in section 149 (the PSED) must be able to identify differently affected groups if they are to be able to analyse the features which may disadvantage some groups over others or affect relations between them, in order to analyse the impact of their policies.”

5.3. Conclusion

- 5.3.1. We conclude that the need to support both administrative coherence by being able to record and verify sex for a range of everyday purposes regulated by laws including but not limited to Equality Act, and the obligation to meet individuals’ Article 8 right to have their sex accurately and reliably recorded, outweigh the state’s obligation to respect the non-sex-based identity of people who identify as trans and non-binary.
- 5.3.2. In any case the Sex Matters proposal for sex to be both a voluntary field in the digital identity scheme and able to be selectively disclosed in practice means that including sex on digital identity would be well within the state’s margin of appreciation in relation to respecting the rights of transgender individuals to privacy.
- 5.3.3. By leaving sex out of the proposed digital identity scheme entirely the government is appearing to try to dodge the difficult task of leadership and of sorting out a system of record keeping which has been allowed to drift into incoherence through ad hoc changes to sex records.
- 5.3.4. There has not yet been a case about whether there is a positive obligation on the state to enable people to verify their biological sex (sex as recorded at birth) via official documents and identity systems.
- 5.3.5. The decision to leave sex out of the national digital-identity scheme also leaves the private-sector digital verification services without a practical foundational means to verify this important personal, legal and biological attribute.
- 5.3.6. We consider that this decision to not to include sex in the national framework of public and private digital identity would be amenable to challenge on human rights grounds as a breach of the UK’s positive obligations under Article 8 and on the basis of irrationality.

6. Section 22 of the Gender Recognition Act

6.1. Legal framework

- 6.1.1. Section 22 (1) makes it a criminal offence for a person who has acquired protected information in an official capacity to disclose the information to any other person. “Protected information” means the information that someone has applied for a gender-recognition certificate, or, if they have been awarded one, information that “concerns the person’s gender before it becomes the acquired gender” (that is, their biological sex).
- 6.1.2. This covers the acquisition of information in an official capacity as a member of the civil service, constable or holder of any other public office, or in connection with the functions of a local or public authority, voluntary organisation, or employer or prospective employer, or in the conduct of business or supply of professional services.
- 6.1.3. It is subject to an unlimited fine and criminal conviction. As far as we know, there has never been a prosecution under Section 22. However, its mere existence has been a key factor leading to corrupted information systems, as employers must design them to avoid employees coming across information that would lead them to commit a criminal act if they shared it.
- 6.1.4. To avoid committing an offence under Section 22 organisations may go to great lengths to protect this data. For example the Information Commissioner’s Office policy says that where it is known that a record includes a person’s acquired gender, hard-copy correspondence should be placed inside two envelopes with the outer envelope marked “OFFICIAL SENSITIVE” and the inner envelope marked “OFFICIAL – SENSITIVE – PROTECTED INFORMATION” and kept in locked storage, with digital information held under similar precautions.⁸ Such systems to protect data can make the records difficult to access and can lead to inconvenience and embarrassment for individuals, as the case of *R v Secretary of State for Work and Pensions (Respondent)* UKSC [2017] illustrates.

6.2. Analysis

- 6.2.1. Recording accurate sex on a digital identity system with the consent of the individual and sharing it with the consent of the individual would not risk breaching Section 22 as Section 22 (4)(b) provides for data sharing with consent, and in any case this data does not reveal whether they have a GRC or not – it only reveals their biological sex.
- 6.2.2. Section 22 (4)(c) provides that it is not a criminal offence to share information about a person’s actual sex “if the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued”.

⁸ Information Commissioner’s Office (2020). [*Policy on the handling of Gender Recognition Certificate cases.*](#)

- 6.2.3. The safest way to avoid committing an offence under Section 22 is not to record a person's "acquired sex" or whether they have a GRC anywhere in the digital identity system, but only their actual sex, which can then be shared with consent, or under other lawful basis, in line with data protection principles. .
- 6.2.4. As *For Women Scotland* has demonstrated there are very limited practical uses for a person's "acquired gender" as provided for by the Gender Recognition Act – marriage is the key situation where it is needed, and this is only likely to take place once, twice or at most a few times in a person's lifetime.
- 6.2.5. Not recording "acquired gender" means that organisations do not have to go to great lengths to protect the data to avoid their staff committing an offence under s.22.